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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: EAC 02 034 54802 Office: VERMONT SERVICE CENTER Date: MAR 26 2003

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a grocery and halal meat market. It seeks to employ the beneficiary permanently in the United States as a meat cutter. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I & N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is January 14, 1998. The beneficiary's salary as stated on the labor certification is $11.44 per hour or $23,795.20 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage as of the priority date and continuing to the present. In a request for evidence of January 10, 2002 (RFE), the director required the petitioner's

1997 federal income tax return, wage and earnings statements (Forms W-2) evidencing wage payments, if any, to the beneficiary for 1998 to 2001, and 2001 quarterly tax returns.

Counsel submitted, in response to the RFE, the petitioner's 1997 and 1998 Form 1040 U.S. Individual Income Tax Returns, including Schedule C, and the beneficiary's Forms W-2 for 1998 to 2001. In no year from 1998 to 2001 did the adjusted gross income, plus the amounts paid to the beneficiary, equal or exceed the proffered wage.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and continuing to the present and denied the petition.

On appeal, counsel submits the petitioner's 1999 to 2001 Form 1040 U.S. Individual Income Tax Returns and a 2001 Form 1065, U.S. Return of Partnership Income for the period from June 1, 2001 to December 31, 2001. Forms W-2 for 2000 and 2001 for the beneficiary totaled, respectively, $14,300 and $17,377. Finally, counsel relies on an accountant's letter dated April 30, 2002 (the report), said to explain the ability to pay the proffered wage.

The report relates chiefly to 2000 to 2002 and explains that the petitioner's business and federal tax returns absorbed certain payroll expenses and employer taxes for a son's business in Philadelphia. The record offers no documentation, or even an allegation, of the alleged Philadelphia unit's own tax return or of the global inclusion of its other expenses and its income on the petitioner's federal tax return. Once assets have been spent on other purposes, they are not available to pay the beneficiary's wage.

For example, the report states in 4:

> Even though the business in different years was showing a tax loss or very little income the employees were still being paid and not laidoff. If it was necessary for the family to put money into the business to pay the bills this was done.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I & N Dec. 190 (Reg. Comm. 1972).

The report suggests that, for 2000 and 2001, the petitioner, a cash basis taxpayer, may, selectively, use accrual accounting for

accounts receivable, as well as expenses from the, otherwise undocumented, Philadelphia business.

Counsel offers no authority for such a calculation of cash flows or assets to justify the ability to pay. The report, as noted, simply suggests that the petitioner is willing to pay without any particulars. The report reconstructs net income of only $16,466 for 2000, less than the proffered wage. For 2001, counsel does not state the basis for the report's selective change to accrual accounting to add back sums for accounts receivable and hypothesize a net income of $60,142 in 2001.

The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I & N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I & N Dec. 503, 506 (BIA 1980).

The report in 3 says:

> Starting June 1, 2001 [redacted] This business is owned by [redacted] and [redacted] a partnership….

This partnership includes no person or entity named in the petition. Its employer identification has no apparent connection to the social security numbers used to file the petitioner's federal tax returns. The discussion in the report and the record offers no documentation to establish how the partnership came to be related to the petitioner's federal tax return.

The record contains no evidence that [redacted] qualifies as a successor in interest [redacted] This status requires documentary evidence that [redacted] has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the petitioning restaurant does not establish that the petitioner is a successor in interest. In addition, in order to maintain the original priority date, a successor in interest must demonstrate that the predecessor had the ability to pay the proffered wage. In this case, the petitioner has not established the financial ability of the predecessor enterprise to have paid the certified wage at the time of the priority date of the petition. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

Though the report proposes the transfers of payroll expenses, employer taxes, and accounts receivable between years, within the sole proprietorship, or to the partnership, no audited financial statement or annual report for 2001 documents any such action. The report lacks requisite financial data for 2000 to 2002.

The response to the director's request for evidence included unaudited financial statements as proof of the ability to pay the proffered wage. They are of little evidentiary value because they are based solely on the representations of management. 8 C.F.R. § 204.5(g)(2), which *see supra* p. 2. This regulation neither states nor implies that an unaudited document may be submitted in lieu of annual reports, federal tax returns, or audited financial statements.

Finally, the 1998 federal tax return at the priority date does not show that net income equals or exceeds the proffered wage. The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability and continuing until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I & N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I & N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. § 103.2(b)(1) and (12).

After a review of the federal tax returns and the report, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.